In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1199

BOBBY JERALD CULPEPPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issues presented are whether the district court correctly admitted evidence of prior "bad conduct" by petitioner and whether, in its instructions to the jury, the court improperly commented on the evidence.

After a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of conspiring to rob a federally-insured bank in violation of 18 U.S.C. 2113(a). He was sentenced to four years' imprisonment. The court of appeals affirmed *per curiam* on January 8, 1973, and rehearing was denied on January 30, 1973 (Pet. 21a). The petition for a writ of certiorari was not filed until March 2, 1973, and is thus out of time under Rule 22(2) of this Court's Rules. There is, in any event, no reason to grant the writ.

The evidence at trial showed that at about 4:40 a.m. on November 7, 1969, the State Bank of Wingate, insured by the Federal Deposit Insurance Corporation, was broken into and a portion of the door of the bank's vault was cut. A Black & Decker cordless electric drill was discovered at the scene (Tr. 5-7, 15, 96-97). An employee of petitioner testified that, prior to the robbery, petitioner had told him of his plan to rob the bank and to obtain the release of Walter Harwell, his alleged co-conspirator, from the Mecklenburg County Jail to assist him (Tr. 31-32, 99-105). Petitioner told the employee that he had met Harwell while confined with him in the Mecklenburg County Jail in September 1969 (Tr. 31-32, 100). The employee also testified that he had purchased a Black & Decker drill for petitioner identical to the one discovered at the bank (Tr. 23, 33, 102-105). The receipt for the drill was introduced into evidence (Tr. 96-97). In addition, a bonding-company employee testified that petitioner had in fact arranged for Harwell's release on bail (Tr. 80-81).

1. Petitioner contends that the trial court erred (a) in admitting petitioner's testimony on cross-examination that he had received a bad conduct discharge from the Army in 1965 and had pleaded guilty to a violation of the Dyer Act in 1964 (Tr. 166), (b) in allowing the government to inquire whether petitioner had been convicted of making and uttering worthless checks when he left Alaska in 1966 (Tr. 162), and (c) in allowing a witness to testify that petitioner had told him he had met his alleged co-conspirator, Harwell, in jail after having been arrested for jumping bail (Tr. 31).

At trial petitioner objected only to the question about the Alaska checks (Tr. 162) which he answered by saying that he did not remember those checks (*ibid.*).

In any event, the inquiries about petitioner's prior act (Tr. 162, 166) were proper since petitioner had taken the witness stand, denied any participation in the conspiracy, and stated that he had no motive for stealing from the bank since he could have obtained as large a loan from the bank as he desired (Tr. 159). These prior acts revealed petitioner's motive by demonstrating his penury and the flaws in his defense. In addition, petitioner's prior acts impeached his credibility as a witness. The district court therefore properly admitted this evidence, with respect to nearly all of which petitioner did not object. See *McGautha* v. *California*, 401 U.S. 183, 215; *Spencer* v. *Texas*, 385 U.S. 554, 560-561.

Moreover, the statement of the witness concerning petitioner's incarceration is independently relevant since petitioner was charged with conspiring with Harwell; and the conpiracy, as charged, included the overt act of arranging Harwell's release from jail. Since petitioner's association with Harwell grew out of their joint incarceration, evidence of that incarceration was relevant.

2. Petitioner also argues that the court committed plain error because certain of its instructions to the jury allegedly constituted improper comments on the evidence. See *Quercia* v. *United States*, 289 U.S. 466. In so arguing, petitioner has quoted portions of the instructions entirely out of context. All of challenged statements are contained in the court's summary of the government's contentions, which the judge repeatedly introduced by stating: "The government says and contends * * *." After summarizing the government's contentions (Tr. 179-189), the judge summarized the defendant's contentions (Tr. 189-192). As the jury surely knew, the court was not expressing an opinion on the

weight to be given the evidence, but rather merely attempting to clarify the position of each side for the benefit of the jury. And that is not an unwarranted comment on the evidence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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